Supreme Court, U.S.
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Docket No.

IN THE

Supreme Court of the United States

October Term, 1995

MICHAEL V. BROWN,

and

GENEVA ENGLAND,

Petitioners,

v.

PLYWOOD PANELS, INC.

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) Whether the directing of verdicts without jury findings, as affirmed by the federal appeals court under the facts and circumstances of these consolidated cases, is consistent with the Seventh Amendment right to a jury trial in civil cases?

(2) Whether the United States Fourth Circuit Court of Appeal's Internal Operating Rules 36.4, 36.5 and 36.6 directing that certain decisions of that court are not to be widely distributed and do no fully operate as binding legal precedent in future cases (as those internal working rules were applied by the Fourth Circuit in these cases) are consistent with constitutional requirements for due process of law and for equal protection for all citizens under the law in the rendering of judicial decisions?

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OPINIONS BELOW

The September 21, 1995 unpublished opinion of the Fourth Circuit United States Court of Appeals sought to be reviewed is reprinted in the Appendix to this petition (1A.) The Fourth Circuit Court of Appeals order consolidating the Brown and England cases for adjudication appears at 19A. The two district court opinions and orders granting summary judgment for the defendant issued by the United States District Court for the Eastern District of Virginia on July 5, 1994 are also reprinted in the Appendix (21A.),(35A.)

JURISDICTION

The jurisdiction of the Court in reviewing this petition vests under 28 U.S.C. Section 1254 (1). The case was brought in federal district court under diversity of citizenship jurisdiction. 28 U.S.C. Section 1332.

LEGAL AUTHORITIES IN ISSUE

AMENDMENT VII OF THE UNITED STATES CONSTITUTION - CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV OF THE UNITED STATES CONSTITUTION

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Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE COMMONWEALTH OF VIRGINIA, ARTICLE 1 SECTION 11. DUE PROCESS OF LAW OBLIGATION OF CONTRACTS; TAKING OF PRIVATE PROPERTY; PROHIBITED DISCRIMINATION; JURY TRIAL IN CIVIL CASES.

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term ``public uses'' to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.

The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

UNITED STATES FOURTH CIRCUIT COURT OF APPEALS
INTERNAL OPERATING RULES

36.4. Publication of Decisions

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains a historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

36.5. Unpublished Dispositions.

Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of

the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Any individual or institution may receive copies of all published opinions of the Court by paying annual subscription fee for this service. In addition, copies of all published opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrate judges, clerks of district court United States Attorneys, and Federal Public Defenders upon request. All published and unpublished opinions are available on EDOS, the Court's Electronic Bulletin Board System, for 30 days after issuance. The federal Reporter periodically lists the result in all cases involving unpublished opinions are retained in the Clerk's Office and a copy may be obtained from the Clerk's Office for $2.00.

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.

36.6. Citation of Unpublished Dispositions.

In the absence of unusual circumstances, this Court will not cite

an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this circuit is disfavored, except for the purpose of establishing res judicata, estoppel or the law of the case.

If counsel believes, nevertheless, that an unpublished dispositions of any court has precedental value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b).

STATEMENT OF THE CASE

Michael Brown and Geneva England appeal from the Fourth Circuit Court of Appeals three-judge panel decision dismissing their personal injury suits on the ground that the Virginia two year limitations period had expired prior to the filing of the suits. The petitioners argue the decision below violated their Seventh Amendment right to trial by jury and also violated their Fourteenth Amendment rights to due process of law and to the equal protection of the law.

Brown and England were career employees with the Norfolk, Virginia factory of Plywood Panels, Inc., a corporation with its principal place of business in the State of Louisiana. Michael Brown began his service with the factory in 1987. Geneva England began working there fifteen years earlier in 1972. The factory produced coated wooden panels for commercial and residential use.[1]

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[1] By necessity, what follows is a comprehensive look at the factual record on summary judgment. Essentially, the workers were subjected to excessive physical strain in the workplace over a two year period right until the factory closed permanently. They filed their suits respectively six and eight months after they left the factory's employ. Other than reviewing footnote 2 appearing on page 18, the argument of this brief can be readily reviewed

By 1990 both Brown and England were assigned as panel inspectors. Inspectors would work on a platform above the production line operating two hand-controls that would accept or reject individual panels. Until a change in the production line made during the July, 1991 summer shutdown, the panel inspectors could sit comfortably in the inspector's chair on the platform. That was because the production line had two additional conveyor belt rollers placed at the location of the inspector's station which would lift the panels into a closer position. The inspector's view of the panels was also enhanced by a light that would clearly show the adequacy of the coated finish on each panel as they sped by.

During the 1991 shutdown, for no apparent reason, the additional rollers and the light used at the panel inspector's station were removed. This change not only made the panel inspector's job mucn more difficult and therefore prone to error, but also required workers to literally place their heads between their knees with their arms held aloft so they could operate the inspector's control

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beginning on page 26 without full benefit of the factual record recited here.

switches but still see the panels as well as possible.

Brown and England and other workers pointed out to factory management that the change in the production line was allowing defective panels to get by. The panels simply could not be seen nearly as well now. It was also mentioned more than once that the unnatural positions panel inspectors now had to assume for entire shifts were causing unnecessary strain and discomfort for workers. These common sense points were discussed with factory management as many as a dozen times between July, 1991 and the time of the closing of the factory in June, 1993. Despite several promises of corrective action, the additional rollers and the light at the inspector's station never were restored.

Brown first sought medical attention in May, 1992 for pain he had developed in his neck. By this time the condition seemed more than a transitory strain. A second severe episode of neck pain occurred in December, 1992. However, at that time both Brown and his family doctor attributed Michael's bouts with neck pain to sleeping wrong or other unknown causes. Only when the condition became chronic in the spring and summer of

1993 was the connection with Brown's work duties made.

An October, 1993 MRI study showed that Brown suffered from two displaced discs in his neck. In August, 1994 Brown underwent a disc fusion surgical procedure under the care of Virginia Beach neurosurgeon Dr. James Dillon. Because of continuing neurological deficits, Brown underwent a second disc fusion procedure in May, 1995. Although now free of constant pain and of frightening neurological deficit episodes, Michael Brown is unable to move his neck in any direction more than a just a bit and is still subject to frequent bouts of debilitating pain. He has not been able to work since leaving his job with Plywood Panels when the factory closed and there is little chance that he will ever be physically able to become meaningfully employed again. As a consequence, the young Brown family has been reduced to relying on Medicaid benefits and food stamps. Brown filed his federal diversity of citizenship suit against his former employer, Plywood Panels, in December, 1993.2

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2 Brown and England bring common law personal injury actions against their former employer because the Virginia worker's compensation laws exclude from coverage injuries to the neck or back caused by occupational diseases. Va. Code Section 65.2-400(B)(4). Repetitive strains injuries can only be considered

Geneva England did not seek medical treatment for neck pain until December, 1993; just three months before she filed suit. Although not to the calamitous extent Brown does, England also suffers from significant disc damage documented by MRI. Although England acknowledges that she experienced transient neck strain almost from the time the inspector's station was changed, the claimed medical consultation by England in October, 1991 relied on in the decision issued below never took place.

Plywood Panels moved the district court for a grant of summary judgment in both cases relying on the two year Virginia limitations period for personal injury actions. In support of their motion, Plywood Panels relied exclusively on the depositions of Brown and England and of Brown's family doctor and England's orthopedic surgeon. In their testimony, neither physician was able to determine when a definable ``injury'' occurred. Several efforts during the depositions by defense counsel to supply conclusions for the physicians through leading questions met with stiff opposition.[3]

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occupational diseases. Middlekauff v. Allstate Ins. Co., 247 Va. 150, 439 S.E.2d 394 (1994).

[3] [Testimony of Frank Westmeyer, M.D.]

Q. Whatever was causing these things, at least began as of August "91; is that correct?

A. Yeah. Whatever was causing his neck pain, but let me -- Let me addendum that. What you're assuming there is that every neck problem he had was caused by the panels. Maybe that's true, maybe that isn't true. I don't know. .....

A. I agree with you that there was a neck problem that had been going on since these dates. I feel like you're trying to box me in to where I'm to admit that it's the same problem every time and I'm not prepared to admit that it's the same problem every time. I'm not sure of that. I mean, you're putting words in my mouth a little bit there. ...

Q. So you have to go back to when they started in order to say that the job is causing the problem; is that correct? That was the first time that there was an identifiable injury that was reported to you that he came in for treatment for or at least reported something to you?

A. Yes. If you keep it that general, yes, I think I can agree to that. All right.

Q. And the problems that he ultimately ended up being treated for by Dr. Temple to the extent they are related to the job injury, are related back to whenever he first started having them back in 1990 by his own history to you; correct?

A. Well, you have got my opinion. I mean, I think I'm just repeating myself here. I think it's silly to go on. I'm just repeating myself.

Q. Well --

A. I mean, you know my opinion. My opinion is that he, Michael, certainly has a neck injury going back to these dates.

Q. 1990?

A. Yes. Okay. Whether -- He may have slept wrong. The first time he complained of pain in 1990, he may have slept wrong. It may have had absolutely nothing to do with his job. Maybe the second time that he came in it may have had to do with his job. Maybe it was in reverse. I can't tell you that.

Q. But you can only go by the history that he's provided to you that some time in 1990 he started experiencing these problems related to the problem of bending his neck at work; correct?

A. Yes. You've heard my opinion multiple times. I have given you my opinion."

[Testimony of Lawrence Morales, M.D.]

"Q. To the extent that she didn't give you an exact date of when the pain occurred, suppose that there was a change in the production line on I believe it was the July 4th holiday, which means she would have come back July 5th, 1991, and she instantly felt a strain in her neck as a result of the change in the production line by history, and suppose that she first went to seek medical attention for that pain and stiffness in her neck as of August of 1991. Would you agree with me that the disk could have occurred by that -- that the disk had ruptured by that point?

A. I'd have to review those medical findings because the statement that you make is one particular episode. If it was a disk problem, then you would have a continuing problem over time.

Q. Well, suppose she indicated by history that that problem continued from that first visit onward and got worse.

A. Then you would have to assume that the injury --

Q. Had occurred prior to that first visit?

A. Yes, that would be the '91 date that you mentioned, if you can show continuity of symptoms." (Exp. 129-130.) ...

"Q. I've only got a couple follow-up questions, Doctor. You've testified you feel the disk herniation in the neck was related to the position she took at work. Would the herniation occur suddenly given that cause or over a period of time?

A. Over a period of time.

Q. When you begin exposure to a harmful position of the neck like that, are you going to have a continuing injury from the first day, or is there any way a physician can tell in retrospect when a, quote, unquote, documentable, diagnosable injury actually occurred within the patient's neck?

A. What you can say is that the patient first started having symptoms when she started complaining of pain. That's the definition of the symptom. And that what we're saying here is that the position that the patient held, that is, her neck being flexed forward, over a period of time caused that to be symptomatic, or to have a problem occur over time because of that position which becomes painful as of a time that's noted by the patient.

Efforts to commit Brown and England to broad conclusions about the nature and timing of their injuries were just as fruitless. Michael Brown made it clear that he did not begin to experience what he described as pain until May, 1992.[4] Summary judgment against

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Q. Is there any way a doctor can tell in retrospect when the disc actually became displaced, when you could have put an MRI on that area and seen a difference from an abnormal MRI as opposed to a normal MRI?

A. I don't think so.

Q. Totally impossible to tell in retrospect when that happened?

A. Well, you have a clinical impression, but the MRI would be the only documentable test to determine the presence or absence of any problems with the disc." (App. 133-134.)

[4] (Testimony of Michael Brown)

"Q. But the bottom line is, you were experiencing pain and stiffness in your neck at least as early as August of '91 and complained about it to Gary Ricks .....

A. Yeah."

....

"Q. Just so that I'm clear, though, you did have pain and stiffness between July and August?

England is premised solely on four or five answers she gave in her deposition about the physical effects of the neck and back strain at her workstation. The dating of significant neck pain to October `91 (so central and so often repeated by Plywood Panels) is based on a leading question from Plywood's counsel directly stating that England's medical records indicated that was the case. What medical record is being referred to by counsel is not made clear in the deposition or anywhere else in the record. In fact, there were no medical consultations by England for neck complaints documented any more than three months prior to her filing of suit; a fact stipulated to at oral argument in the court of appeals. Without the suggested confirmation by England of defense counsel's alleged medical record review, the onset of

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A. Wait a minute. Correction. I got stiffness in my neck and felt the strain, but really it didn't get worse enough for me to really start complaining about until ... '92 when I started going to the doctor.

Q. Okay, But it was a gradual worsening of whatever condition you had?

A. Right." (App. 72-74.)

England's injury is not tied to any time-frame other than December, 1993.

Brown and England argued principally on brief and at oral argument at both the district court and the Fourth Circuit Court of Appeals that Plywood Panels continued to commit negligence causing injury to these workers right up to the time the factory was closed in June, 1993. The company had continuously allowed a harmful work condition to exist in disregard of more than several warnings of the physical danger to workers. Under familiar principles, personal injury limitations periods do not accrue until either the negligence causing the injury ceases or the injury becomes complete. C.J.S. Vol. 54, Limitations of Actions, Section 177 (West Pub. Co. 1987), American Jurisprudence, Second Edition, Vol. 51, Limitations of Actions, Section 137 (Lawyer's Coop. Pub. Co. 1970), Michie's Jurisprudence, Virginia and West Virginia Law, Vol. 12A, Limitations of Actions, Section 23 (Michie's Pub. Co. 1989). The workers further argued that two Fourth Circuit decisions had established the (somewhat inconsistent) principle that the amount of injury sustained within two years of filing suit defined what compensable damages fell within the Virginia limitations period. Williams v. E. I.

DuPont DeNemours & Co., 11 F.3d 464 (4th Cir. 1993), Large v. Bucyrus-Erie Co., 707 F.2d 94 (4th Cir. 1983). Therefore, the workers, at a minimum, were entitled to show that most if not all of their ``injury'' was caused during the last eighteen months of their employment rather than during only the first six months they were exposed to the hazardous work condition.

On this record, the Fourth Circuit held that the law and evidence supporting the employer's affirmative defense was so comprehensive and convincing that that the workers should be denied their right to have a jury decide the facts of their case.

Both opinions below skirt the continuing negligence doctrine by stating that Virginia law limits that doctrine's application to cases involving a physician-patient or an attorney-client relationship. (16A, 28A, 42A.) There is no legal authority to support that conclusion.[5]

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[5] The case cited twice by the Fourth Circuit panel opinion in support of their reasoning on this point actually states the following:

> "Since the beginning of this century, our cases have adhered to the general proposition that "where there is an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run . . . until the termination of the undertaking or agency . . . This

Both opinions overlook the principle applied in the circuit's own Williams and Large cases saying that these workers were hurt more gradually than the workers in those cases were. One of those workers, though, Mr. Large, was exposed to high level sound and thick dust in the air from the operation of power shovels for over sixteen years. Only two weeks of his exposure to these conditions occurred within two years of filing his suit. Under the opinion's clear reasoning, any degree of injury incurred within that two week period fell within the Virginia limitations period.

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rule has been applied to varying circumstances . . . Applying an analogy of the "continuing treatment" rule we adopted in Farley to the attorney-client relationship in this case, we conclude that the particular undertaking of the attorney continued until November 1980, when Denny rendered his last professional services . . . Keller v. Denny, 232 Va. 512, 352 S.E.2d 327 (1987), at S.E.2d 329, 331 at Va. 516, 519.

Other Virginia cases unrelated to the provision of professional services cited at brief below also applied the continuing wrongs doctrine. See Wilson v. Miller, 104 Va. 446, 51 S.E. 837 (1905), City of Richmond v. James, 170 Va. 553, 197 S.E. 416 (1938). No decision in American jurisprudence until this case limits the continuing negligence doctrine to claims involving the provision of professional services.

But the greatest injustice committed in this case is not found in that deceptive reasoning. The greatest injustice came in a different passage in the Fourth Circuit opinion.

In choosing how to apply the very demanding evidentiary burden of proof under Virginia law the employer had to meet, Judge Phillips wrote:

> `` {To defeat the requirements of the Seventh Amendment privilege of Brown and England to have the facts of their case decided by a jury} ... Plywood Panels .... needed only to establish {to a judge's satisfaction} that it was more probable than not that the injuries occurred more than two years prior to the dates Brown and England filed suit.'' (13A-14A) [6]

REASONS FOR GRANTING CERTIORARI

These cases involve the violation of a central constitutional principle found in the Bill of Rights; the right to trial by jury. The broad parameters

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[6] The Virginia courts impose a high evidentiary standard in assessing the proof in support of limitations defenses in workplace harmful exposure cases. Locke v. Johns-Manville Corp., 221 Va. 951, 275 S.E.2d 900 (1981). The standard of proof is evidence that "pinpoints the precise date of injury with a reasonable degree of medical certainty". Id, 275 S.E.2d at 905.

of the decision below all but excludes an entire class of citizens (those workers injured over a period of years) from seeking recovery for disabling injuries from the parties responsible for those injuries simply because the injury is cumulative rather than immediate. This, in effect, shifts the burden of compensation to disabled workers from the private sector to the public sector contrary to long established common law principles.

Just as importantly, these cases also invoke the constitutional right to due process of law and to the equal protection of the laws. These issues arise in a context in which it is especially imperative for this Court to exercise its supervisory authority over the lower federal courts. Unlike with the occurrence of arbitrary action by the executive and legislative branches of government, there is no remedy to seek when the federal courts are the party infringing on the liberty and access to justice each United States citizen enjoys.

For these reasons, this petition should be granted.

I. THE PETITIONERS WERE DENIED THEIR CONSTITUTIONAL RIGHT TO TRIAL BY JURY

The Seventh Amendment preserved the citizen's right to a jury trial in

the kinds of cases and issues that colonial and early American courts had historically called juries to decide. The right to trial by jury in a negligence suit was protected under American law long before the passage of the Bill of Rights.

This Court first approved the general procedure now in practice for directed verdicts in Parks v. Ross, 11 How. 362 (1850). In that case, the trial court had instructed the jury to hold in favor of the defendant; a directed verdict rather than a risky demurrer to the evidence as at English common law. The Parks court found there to be no significant difference between the two.

The next inroad on the power of American juries to weigh evidence and determine facts, the ``substantial evidence'' rule, met with constitutional approval eighty years later in Gunning v. Cooley, 281 U.S. 90 (1929). In affirming a jury verdict in favor of the patient in a medical malpractice suit, the Court reached out to pronounce:

> ``Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a

peremptory instruction to the jury.'' (Id., at 94).

But even in Gunning, the Court's analysis of the proximate cause issue permitted the jury wide latitude in reaching its verdict. The opinion approved a finding that the physician had mistakenly placed acid in the patient's ear despite an absence of acid induced scar tissue in the patient's ear canal.

The definition of ``substantial evidence'' remained rather liberal in Tenant v. Peoria & Pekin Union Railway Co., 321 U.S. 29 (1944). In that case, the family of a railroad worker brought a wrongful death claim against a railroad. The jury awarded the decedent's estate a verdict. The central weakness in the plaintiff's evidence was the absence of an eyewitness account to show exactly where and in what way the defendant was working in the moments before he was crushed by a moving rail car. Evaluating the range of possibilities, a court of appeal's decision directed a judgment for the railroad on the issue of causation. This Court reversed the appeals court in ruling:

> ``It is not the function of a court to search the record for conflicting circumstantial

> evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.
>
> [The jury] weighs the contradictory evidence and inferences, judges and draws the ultimate conclusion as to the facts.'' Id. at 35.

In the decision below in these cases, the appeals court wholly disregarded the few Seventh Amendment cases this Court has reviewed. The appeals court opinion asserts, contrary to the longest standing traditions of English/American law, that judges rather than only juries have the authority to evaluate the trial evidence on its merits to determine which factual inferences are more or less likely. This rationale effectively reduces the role of the jury to that of an advisory opinion that the courts do not have to even ask for.

All earlier Fourth Circuit decisions have jealousy guarded the constitutional right to trial by jury in a civil case. Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061 (1969), Howard v. McCrory Corp., 601 F.2d 133 (4th Cir. 1979), N.J. Scavens

& Macks Stores, Inc., 577 F.2d (4th Cir. 1978), Mays v. Pioneer Lumber Corporation, 502 F.2d 106 (4th Cir. 1974). The ``more probable than

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[7] This uniformity of decision-making, though, does not seem to always apply to unpublished opinions of the Fourth Circuit Court of Appeals. For example:

Carroll v. Litton Systems, Inc., (4th Cir. 2/1/95 No. 92-2219), without jury findings, all but precluded several families from recovery of any kind against a plant that had polluted their wells with a toxic chemical.

Beverly v. Charles Machine Works, Inc., (4th Cir. 12/2/9/94 No. 94-1246) found that a gentleman injured when the clutch on a trencher engaged while in the off position could not have a jury consider his case because the accident could have been caused by overgreasing rather than the design defect within the trencher clutch.

The second young soldier grievously injured by the reckless behavior of several government contractors lost his case on a directed verdict in a diversity suit even though the Virginia Supreme Court had already affirmed a jury verdict in the far weaker companion case. Daneshmand v. Hazard, et. al., (4th Cir. 1/10/94 No. 92-1856), Hazard v. Panco, 240 Va. 438, 397 S.E.2d 866 (1990).

Shelton v. Velsicol Chemical Corp., (4th Cir. 11/12/92 No. 92-1169) held that a farmer who developed kidney cancer ten years after exposure to a toxic pesticide was not entitled to a jury trial.

Lee v. Baxter Health Care Corp., (4th Cir. 2/27/90 No. 89-2143) held that a woman who had both of her breast implants

not'' test in applying summary judgment expressed in this case is one that has never been applied in any decision in American jurisprudence counsel has located.

II. RULES OF COURT WHICH SUBSTANTIALLY RESTRICT THE AVAILABILITY AND STARE DECISIS EFFECT OF DECISIONS ISSUED BY THE COURT VIOLATE CONSTITUTIONAL GUARANTIES TO DUE PROCESS OF LAW AND TO THE EQUAL PROTECTION OF THE LAWS.

The remaining issues in this case of great importance to constitutional law concern the way the appeals court chose to distribute this entirely novel decision; through an unpublished opinion.

The Fourth Circuit's internal rules set out above direct that opinions of the court will be

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puncture could not have a jury consider whether the implants were defective since the implant manufacturer had given a warning to her doctor (but not to the patient).

An elderly couple socked with a $1,250,000 judgment based on a fourteen year old guaranty for their sons' business, not only suffered summary judgment, but were never afforded the opportunity to put on evidence in their defense at any point in the proceedings. Thomas v. General Electric Credit Corp., (4th Cir. 8/3/95 No. 94-1395, No. 94-1559).

unpublished and very narrowly distributed unless the decision adds to the body of existing law. The first page of the panel opinion issued in this case flatly states: ``Unpublished opinions are not binding precedent in this circuit.'' (2A.)

Opinions are unpublished in order to grant judges greater license in writing noncontroversial opinions and to eliminate the costs of full publication where possible. The rationale of the no citation rule is that it levels the playing field between those parties who can afford the cost and effort of locating unpublished appellate opinions and those parties who cannot. See ``Unfairness and Access to and Citation of Unpublished Federal Court Decisions'', 18 Goldengate University Law Review 277 (Summer 1988). Most of the federal circuits have now adopted some variant of the no citation rule with unpublished opinions.

The problem with this practice is threefold. First, it allows federal judges to decide just how important their own decisions are. It has occurred more than once in this Court for an unpublished court of appeals decision to be fully reviewed and reversed. Board of Educ. v. McCloskey, 458 U.S. 970 (1982), Board of Educ. v. Rowley, 458 U.S. 176 (1982), County of

Los Angeles v. Kling, 474 U.S. 936 (1985).

The second weakness is the way limited distribution of court decisions undermine the principle that court proceeding of all kinds be public and subject to scrutiny. In the Fourth Circuit, unpublished opinions are made widely accessible to the public for only a thirty day period after their issuance and only on one reference list. The sharp movement away from all appeals court decisions being readily accessible to counsel and to the public smacks of secretive decision making.

Finally, the no citation rule in combination with limited distribution of unpublished decisions opens a gaping opportunity for federal courts to disregard controlling precedent in a particular case yet never have to address the stare decisis effect such a decision would have in future cases. If the reasoning in this decision below, for example, were actually followed, workplace injuries and many other harmful exposure cases would be virtually barred in the federal courts within the Fourth Circuit. Not only would those federal courts be weighing the facts for the jury in those cases, but the courts would be doing so with a

clear[8] bent towards one side of the case.

To deprive a party in this way of having his or her case become precedent for future cases can in an outrageous case also deny that party the basic right to have existing law decide their case under principles of stare decisis. That principle, that the courts are bound by their prior decisions, is the only reliable limit on judicial power. Without the doctrine of stare decisis always applying, the law can be changed from white to black for one case only without leaving a trace of the injustice behind.

Such a result, arbitrarily depriving a citizen of the protection of the law, offends the constitutional doctrines of Due Process of Law and the Equal Protection of the Laws.

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[8] The economic impact in just the Brown case shifts from the private sector to the public sector the weight of paying hundreds of thousands of dollars for medical expenses and for the support of the destitute Brown family. Given that the Fourth Circuit's rationale here would effectively bar thousands of other workers from any legal remedy for debilitating spinal injuries, the burden to the social safety net becomes truly enormous. Although taxpayers have no legal standing to challenge decisions like this, maybe they should.

III. CONCLUSION

As stated by Mr. Jefferson in drafting the opening clauses of the Virginia Constitution, ``in suits {at common law} ..., trial by jury is preferable to any other, and ought to be held sacred.'' Constitution of the Commonwealth[9] of Virginia, Article 1, Section 11.

STEPHEN GARY MERRILL, ATTORNEY
COUNSEL FOR THE PETITIONERS

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[9] For more on the views of Thomas Jefferson, Alexander Hamilton and others on the importance of the right to trial by jury see: The Federalist Papers, pp. 495-510 (New American Library, New York 1961) and The Republic of Letters: The correspondence between Thomas Jefferson and James Madison, 1776 - 1826. (W.W. Norton, New York 1995.)

APPENDIX INDEX

(1) Unpublished Opinion of the United States Court of Appeals for the Fourth Circuit of 6/7/95.....1A
(2) United States Court of Appeals Order for the Fourth Circuit of 8/22/94.....19A
(3) United States District Court for the Eastern District of Virginia Opinion and Order of 7/5/94.....21A
(4) United States District Court for the Eastern District of Virginia Opinion and Order of 7/5/94.....35A

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Michael V. Brown,
Plaintiff-Appellant,
v. No. 94-2008
Plywood Panels, Inc.
Defendant-Appellee.
Geneva England,
Plaintiff-Appellant
v. No. 94-2009
Plywood Panels, Inc.,
Defendant-Appellee.
Appeals from the United States District Court
for the Eastern District of Virginia,
at
Norfolk.
Tommy E.Miller, Magisrate Judge.
(CA-93-1185, CA-94-149)

Argued: June 7, 1995
Decided: September 21, 1995
Before HALL and WILLIAMS, Circuit Judges,
and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished opinion. Senior Judge Phillips wrote the opinion, in which Judge Hall and Judge Williams joined.

COUNSEL

ARGUED: Stephen Gary Merrill, GHENT LAW OFFICES, Norfolk, Virginia for Appellants. Louis Herbert Lazaron, TAYLOR & WALKER, P.C., Norfolk, Virginia for Appellee. **ON BRIEF:** James E. Brydges, Jr., TAYLOR & WALKER, P.C., Norfolk, Virginia for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PHILLIPS, Senior Circuit Judge:

In their consolidated appeals, Michael Brown and Geneva England challenge a magistrate judge's order granting their employer, Plywood Panels, Inc., summary judgment on the ground that their claims of workplace personal injury were barred by Virginia's two-year statute of limitations. We affirm.

I

Stated in light most favorable to the claimants, the facts of record are these. England worked at Plywood Panels from 1972 until 1993; Brown from 1987 until 1993. By 1990, both were

employed as panel inspectors, working ten hour shifts four or five days a week. Until July 5, 1991, they sat on a platform above the production line watching plywood panels move by on a conveyor belt pushing buttons to reject defective panels or accept good ones. The production line at the time had a roller which lifted the panels up to the inspection panels while in a relaxed, sitting position. In addition, well-placed lights illuminated the panels as they passed by.

When Brown and England returned to work on July 5, 1991, after the annual factory shutdown, the lights had been repositioned and the roller had been removed. AS a result, the panels were no longer lifted or lit for the inspectors to examine. To compensate for the change, the inspectors had to sit with their heads ducked down between their knees to be able to examine the panels passing underneath, but with their arms held up to reach the accept/reject buttons. Maintaining this position for ten hour shifts caused the claimants considerable neck and back strain in addition to reducing their efficiency. Within weeks of the reconfiguration of the production line, both noticed back and neck strain and suggested to their supervisors that the roller be restored to the production

line. They continued without success to make that suggestion and to complain about their discomfort to their supervisors until the factory closed permanently in June, 1993.

Their back and neck pain gradually worsened until both sought medical treatment. Brown did not consult a physician until May 1992, when he consulted his family practitioner, Dr. Frank Westmeyer. Earlier, he had consulted Dr. Westmeyer about neck pain in either March 1990 or March 1991, before the removal of the roller from the assembly line. He again consulted Dr. Westmeyer about neck pain in May, June, and August 1992. Brown initially associated the pain he reported in 1992 with the unknown causes of his earlier pain or with sleeping ``wrong on his neck,'' instead of his new work conditions. J.A. 142-44. Treatment with anti-inflammatory drugs and muscle relaxants, wearing a cervical collar, and physical therapy temporarily resolved the problem. Brown consulted Dr. Westmeyer several times during the fall of 1992 for other problems but did not mention neck pain during those visits. He returned to Dr. Westmeyer in December 1992 with a recurrence of the neck pain. Dr. Westmeyer referred Brown to a chiropractor, Dr. Rick Temple, who was the first professional consultant to relate Brown's pain to

his working conditions. Eventually, in October 1993, Dr. Temple ordered an MRI examination of Brown. This revealed the severity of his condition; he was suffering from bulging discs in the vertebrae of his neck which caused a narrowing of the neural canal and pinched nerves.

England, first sought medical treatment for her neck pain in December, 1993, from Dr. Lawrence Morales. Earlier, perhaps as early as October, 1991, she had mentioned having neck pain to her family physician, who attributed it to pre-existing arthritis and treated it as such. In December, 1993, using x-ray and MRI examination, Dr. Morales diagnosed her condition as spondylosis (degenerative bony changes characterized by development of spurs) and a herniated disc.

Brown commenced a federal action against Plywood Panels under the diversity jurisdiction on December 8, 1993. England commenced a comparable action on February 4, 1994. Both complaints alleged that Plywood Panels was negligent in not altering the production line to correct the conditions about which the panel inspectors complained, and that this negligence was the proximate cause of the respective injuries suffered by the

claimants.[1] By consent of the parties the two cases were assigned for determination by a United States Magistrate Judge. Before the magistrate judge, Plywood Panels moved separately for summary judgment in both cases on the ground that each was barred by the applicable Virginia two-year statue of limitations.

In opposition to the motions, the claimants offered, respectively, the deposition testimony of Drs. Morales and Westmeyer. Each physician deposed that the problems they diagnosed were progressive ones rather than ones with

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[1] Under Virginia law, only common law personal injury actions were available to these claimants as a potential source of remedy. The Virginia Worker's Compensation Act does not cover their alleged injuries. It provides remedies only for "injury by accident arising out of .... employment" and "occupational diseases," Va. Code Ann. § 65.2-101 (Michie 1995), and under Virginia law the injuries here at issue are neither. They are not "occupational diseases," because the Act specifically excludes from this category "any condition of the neck, back or spinal column." Id. § 65.2-400 (B)(4). They are not "accidental injuries" because the Virginia Supreme Court has held that "injuries resulting from repetitive trauma, continuing mental or physical stress, or there cumulative events" do no fall in that category. Middlekauff v. Allstate Ins. Co., 439 S.E.2d 394,396 (Va. 1994). The common law right of action remained available as a potential source because it in unimpaired where the Worker's Compensation Act does not apply. Griffithe v. Raven Red Ash Coal Co., 20 S.E.2d 530, 553-34 (Va. 1942).

a sudden onset, and that they were unable to pinpoint the date of onset of the problems. J.A. 128-34, 150-55, 161-65, 170-72. Both opined, however, that the serious problems of both claimants that were discovered in 1993 were related to the initial onset of back and neck pain symptoms first experienced and reported by each claimant, and that both doctors had ultimately to rely on the history given by the patient in trying to establish the date of onset of the injury for which remedy was sought. J.A. 130, 163-64. And, Dr. Westmeyer emphasized that there was no way for him to tell which episodes of pain were related to Brown's work conditions and which had other causes (such as sleeping position). J.A. 164, 167.

Following a hearing held jointly with respect to the two actions, the magistrate judge granted the motions for summary judgment in each on the ground that the claims were barred by Virginia's two-year statute of limitations for personal injury actions. In both cases, the court held that ``although the facts suggest that [plaintiff's injury was eventually diagnosed and that the injury became more severe over time, the law in Virginia does not prevent the cause of action from accruing the day the injury was initially sustained.'' J.A. 219,

229. The court held that Brown's cause of action accrued in July of August 1991, more than two years before he filed his complaint, when he first suffered symptoms of pain and discomfort, even though the pain increased and his medical condition worsened over time. Similarly, the court held that England's cause of action accrued in July or August 1991, or October 1991 at the latest, more than two years before she filed her complaint. These appeals followed and were consolidated for determination by this Court.

II

In these diversity cases, we look to Virginia law for the applicable statute of limitations and for the rule regarding when the claimant's causes of actions accrued. Joyce v. A.C. & S., Inc., 758 F.2d 1200, 1203 (4th Cir. 1986) (citing Ragan v. Merchants Transfer & Warehouse Co., 227 U.S. 530 (1949)). Under that law, the statute of limitations for personal injury claims is two years from the time the cause of action accrues. Va. Code Ann. § 8.01-243 (A)(Michie 1992).

A cause of action accrues under Virginia statutory and decisional law only when all three elements of the cause of action-duty owed, duty

violated, injury proximately caused thereby-have occurred. Lock v. Johns-Manville Corp., 275 S.E.2d 900, 904 (Va. 1981)(citing Caudill v. Wise Rambler, 168 S.E.2d 257, 259 (Va. 1969)). Virginia statutory law incorporated this rule: in personal injury actions, ``the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained.'' Va. Code Ann. § 8.01-230 (Michie 1992) (emphasis added). ``Injury,'' for accrual purposes, means ``positive, physical or mental hurt to the claimant, not legal wrong to him in the broad sense that his legally protected interests have been invaded.'' Locke, 275 S.E.2d at 904. Accordingly, although Plywood Panels may have come under a duty to correct the claimants' harmful working conditions and failed negligently to do so as early as mid-1991, the claimants' causes of action did not necessarily accrue immediately upon the first negligent violation of duty, but only when they first suffered legally compensable physical harm. This issue controlling whether summary judgment in favor of Plywood Panels was appropriate, therefore, is whether Brown and England were ``injured,'' for accrual purposes, more than two years

before they filed their respective actions.

Their injuries in the required sense are not necessarily the herniated and bulging discs respectively diagnosed for each only in 1992. Because ``there is but a single, indivisible cause of action for all injuries sustained, whether or not all of the damage is immediately apparent,'' Joyce, 785 F.2d at 1204 (footnote omitted), it is the first such injury sustained by each claimant that controls the accrual of the cause of action, notwithstanding that more significant injuries may later have developed. In other words,

> when any injury, though slight, is sustained as the consequence of an alleged wrong, the right of action for a personal injury accrues and the statute of limitations begins to run at once. It is immaterial that all the damages resulting from the wrong may not have been sustained at the time of the negligent act; the running of the statute of limitations is not postponed by the fact that substantial damages do not occur until a later date.

Williams v. E.I. DuPont de Nemours & Co., 11 F.3d 464, 466 (4th Cir. 1993) (applying Virginia law and quoting

Scarpa v. Melzig, 379 S.E. 2d 307, 309 (Va. 1989)). See also Starnes v. Cayouette, 419 S.E. 2d 669, 671 (Va. 1992) (``{W}hen a tort causes a contemporaneous personal injury, the fact that the victim suffered greater physical ... hurt from that tort at a later date does not defer the date of accrual of the cause of action.''). The causes of action here accrued and the statute of limitations began running, therefore, as soon as they developed any injuries, however slight, from their work conditions. Critically, under Virginia law, this is not the date when a doctor first diagnosed an injury or communicated a diagnosis to once claiming injury. Locke, 275 S.E.2d at 905-06 (no ``discovery rule'' in Virginia limitations law).

Our opinion in Joyce is instructive. There, we held that a plaintiff's personal injury asbestosis claim was time-barred because, although his asbestosis had developed within two years of the time he initiated his suit, he had long before begun to suffer from other, minor asbestos-related illnesses.[2] The onset of the

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[2] A later amendment to the applicable statute of limitations now provides that asbestos-related causes of action do not accrue until a diagnosis of the disease is communicated to the patient by a physician. Va. Code An.. §8.01-249(4)(Michie Supp. 1995). This

first asbestos-related disease marked the accrual of this cause of action as to all diseases resulting from his exposure, rather than the onset of each disease marking the accrual of a separate cause of action. Joyce, 785 F.2d at 1205. Significantly, the fact that, for at least a decade, the Joyce plaintiff's first disease (pleural thickening) was asymptomatic and its existence was known only to the employer through its routine physical examination of him but not the plaintiff, did not alter the holding that the onset of the first disease began the running of the statute of limitations. Id. at 1202. See also McHenry v. Adams, 448 S.E.2d 390 (Va. 1994) (plaintiff's cause of action for emotional distress accrued when he first became aware of emotional problems at his mother's gravesite rather than later when he confirmed the problems by having his mother's body disinterred and at that time suffered intensified physical and mental problems).

Similarly, here Brown and England suffered from physical ailments that

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amendment did not apply retroactively to Joyce, see Palmer v. Norfolk & W. Ry. Co., 646 F. Supp. 610, 612 (W.D. Va. 1985) whose "indivisible cause of action" analysis remains in place as to non-asbestos claims.

were characterized by gradual onset, beginning with minor back and neck strain and progressive to more serious injuries (the bulging and herniated discs). It is of no consequence that their injuries became worse with time, that more serious medical conditions than those which evoked their first minor complaints developed later, and that the injuries were initially undiagnosed and relatively asymptomatic. The question is only when, in relation to their commencement of actions, they sustained the first compensable injuries as a result of the altered working conditions to which they ascribe all their injuries.

Because Plywood Panels is seeking summary judgment regarding the affirmative defense of the statute of limitations, it bears, the burden of establishing that the dates of Brown and England's first injuries were more than two years before the dates they filed suit. Clifton D. Mayhew, Inc. v. Blakke Constr. Co., 482 F.2d 1260, 1262 (4th Cir. 1973). These dates must ``be established from available competent evidence, produced by a plaintiff or a defendant, that pinpoints the precise date of injury with a reasonable degree of medical certainty.'' Locke, 275 S.E.2d at 905. A ``reasonable degree of medical certainty'' means that ``it is at least more probable than not''

that the injuries occurred at a particular time. See Greif Cos. (Genesco) v. Sipe, 434 S.E.2d 314, 318 (Va. Ct. App. 1993) (applying definition in context of Worker's Compensation Act). Plywood Panels therefore was not required to establish as a matter of law the exact date that the injuries first were sustained; it needed only to establish that it was more probable than not that they occurred more than two years prior to the dates Brown and England filed suit.

Plywood Panels has contended throughout that the accruing injuries occurred on the date that the appellants first returned to work after the production line was changed, July 5, 1991, or, at the latest, on the date they first felt pain in their necks. It pinpoints this later date as sometime in July or August 1991, soon after the production line configuration was changed, when the claimants both first complained to their supervisors that the change was causing them difficulties.

We agree. In deposition, Brown admitted that he had experienced back and neck pain as early as July or August 1991, although he qualified this by stating that the pain was not severe enough to justify seeking medical attention until 1992. J.A. 60-61, 73-74. England similarly stated in

deposition that she complained about neck and back pain as the first day after the assembly line had been changed and that she had experienced symptoms similar to the ones associated with her herniated disc as early as October 1991. J.A. 90-95. Their doctors both testified in deposition that they could not pinpoint the exact date that the injuries had occurred, but that they would rely on the medical history provided by their patients to determine when the injuries began. They both concluded that the herniated or bulging discs were progressive problems that would have begun earlier than the first visit to the doctors and that onset would have to be traced back to the patients' first complaints of pain. Accordingly, although it is not possible to pinpoint the exact date of the onset of Brown and England's first injuries, we conclude that the undisputed evidence (medical and otherwise) establishes that Brown and England were first injured in the summer or fall of 1991, which in any case is more than two years before December 8, 1993 (the date Brown file suit) and February 4, 1994 (the date England filed suit). We therefore agree with the magistrate judge's conclusion that both actions are barred by the statute of limitations.

In so holding, we reject two theories proffered by the claimants. First, invoking the ``continuing wrongs'' doctrine, they contend that their cause of action did not accrue until the last day that they were exposed to the neck-straining work conditions, June 16, 1993, which was well within two years of the dates they filed suit. This doctrine, under which a cause of action for injuries caused by a continuing wrong accrues only at the time the tortious conduct ceases, does not, however, apply under Virginia law except in cases involving ``a relationship of professional to client wherein the professional had undertaken to perform a duty that required a continuation of services.'' Large v. Bucyrus-Eire Co., 707 F.2d 94, 98 (4th Cir. 1983); see also Keller v. Denny, 352 S.E.2d 327, 330-31 (Va. 1987) where applicable, tolls statute until provision of serves has ended). The Virginia Supreme Court has expressly declined to extend the doctrine to personal injury cases not involving attorney-client, doctor-patient malpractice claims. Keller, 352 S.E.2d at 330-31; see Large, 707 F.2d at 98 (interpreting Virginia law as not applying doctrine in situations involving continuing exposure to physical hazard after onset of injury).

The ``continuing wrong'' doctrine does not apply here.

We also reject as inapplicable here the ``multiple tort'' theory urged by claimants. Under that doctrine, each day's injury from a repeated course of separate violations of duty gives rise to a separate cause of action. As applied here, claimants urge this would make these actions timely as to all injuries sustained within the two years immediately preceding their commencements of action. We agree with the district court that the injuries that allegedly occurred here do not involve ``multiple tort'' for statute of limitation purposes, but instead involve an indivisible single cause of action for an injury first sustained well outside the limitations period that resulted eventually in considerably greater physical harm than that first experienced.[3] See Locke, 275 S.E. 2d at 904-05.

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[3] The claimants' reliance on Williams v. E.I. Dupont de Nemours & Co., 11F.3d 464 (4th Cir. 1993), as support for their multiple-tort argument is misplaced. The split-panel majority decision in that case, which arguably does apply such a theory (as opposed to an extension of the related "continuing-tort" theory) is distinguishable. The claim in Williams was of cumulative injury resulting from repetitive exposures of claimant - a commercial spray painter - to a paint manufacturer's allegedly hazardous paint product. Because the panel majority in Williams thought that the claimant's proffered

proof in opposing summary judgment included one episode of specific harm from one particular day's exposure, the court held that this gave rise to a separate cause of action, making wholesale dismissal of the claim of cumulative injury improper. Here, no evidence of discrete injury from a particular day's exposure to the hazard complained of appears in the record. If, as Williams indicates, Virginia law contemplates such an application of multiple-tort by repetitive-conduct theory to statute of limitations defenses, the instant case does not provide the occasion for its application.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 22,1994

No. 94-2008
CA-93-1185

MICHAEL V. BROWN

Plaintiff - Appellant

v.

PLYWOOD PANELS, INC.

Defendant - Appellee

No. 94-2009
CA-94-149

GENEVA ENGLAND

Plaintiff - Appellant

v.

PLYWOOD PANELS, INC.

Defendant - Appellee

O R D E R

The Court consolidates these cases for purposes of briefing and oral argument and directs that:

1. one joint brief shall be permitted per side;
2. the parties on each side shall share the time allowed for oral argument;
3. each side shall notify the Court of the attorney designated as lead counsel within ten days of the date of this order.

For the Court - By Direction

/s/ Bert M. Montague

CLERK

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

MICHAEL V. BROWN,

Plaintiff,

v. CIVIL ACTION NO. 2:93cv1185

PLYWOOD PANELS, INC.,

Defendant.

OPINION AND ORDER

This matter comes before the Court on defendant's Motion for Summary Judgment filed on June 14, 1994. Plaintiff Michael Brown filed a response and brief in opposition on June 27, 1994. The parties have consented to have all proceedings in this case conducted before a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. The undersigned heard oral arguments on this matter on Tuesday, July 5, 1994.[4]

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[4] Counsel also argued defendant's Motion for Summary Judgment in a related case, Geneva England v. Plywood Panels, Inc. The Court issued a separate Opinion and Order in Ms. England's case.

I. STATEMENT OF THE CASE

Plaintiff Michael Brown worked at Plywood Panels, Inc.'s Norfolk plant as a panel inspector. He worked ten hour shifts four or five days per week. (Pl.'s Complaint 4). Plaintiff described that the production line had an applicator roller which changed the angles of the panels enabling the inspector to check the panels for defects while in a relaxed sitting position. (Brown Dep. p.7,1 lines 16-25.) When plaintiff returned to work on July 5, 1991, the roller in the production line had been removed and the lights near the panel production line had been changed. (Brown Dep. p.8, lines 3-7.) As a result of this change, the inspectors including plaintiff ``were required throughout their work shift to shift and strain their necks, shoulders and upper backs in order to properly inspect the panels.'' (Pl.'s Complaint 7). Plaintiff left the employment of defendant when the plant closed on June 16, 1994.

On December 8, 1993, plaintiff filed a Complaint in the United States District Court for the Eastern District of Virginia, Norfolk, Division. Plaintiff claimed that defendant was negligent in altering the panel production line and not taking

corrective action upon hearing the panel inspector's complaints of physical pain and discomfort. Plaintiff further alleged that defendant's negligence was the direct cause of plaintiff's ``permanent, painful injury to his neck and upper torso.'' (pl.'s Complaint 9.)

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment should be granted only if ``there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.'' Fed. R. Civ. P. 56(c). For the evidence to present a ``genuine'' issue of material fact, it must be ``such that a reasonable jury could return a verdict for the non-moving party.'' Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). Facts are deemed material is they might affect the outcome of the case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In other words, the moving party's submission must foreclose the possibility of the existence of facts from which it would be open to a jury to make inference favorable to the non-movant. Id.

In deciding a summary judgment motion, the court must view the record as a whole and in the light most favorable to the non-moving party. Terry's Floor Fashions, Inc. v. Burlington Indus., Inc., 763 F.2d 604, 610 (4th Cir. 1985). Either party may submit as evidence ``pleadings, depositions, answers to interrogatories, and admissions on file, together with ... affidavits'' to support or rebut a summary judgment motion. Fed. R. Civ. P. 56(c). Supporting and opposing affidavits must be based on personal knowledge and must set forth facts that would be admissible in evidence. Fed. R. Civ. P.56(e). Furthermore, the party moving for summary judgment need not supply ``affidavits or other similar materials negating the opponent's claim. Celotex, 477 U.S. at 323. When a motion for summary judgment is made and supported with affidavits as it is in this case, however, ``an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial.'' Fed. R. Civ. P. 56(e).

Rule 56 mandates summary judgment against a party who ``fails to make a

showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.'' Celotex, 477 U.S. at 322. The party who bears the burden of proving a particular element of a claim must ``designate `specific facts showing there is a genuine issue for trial`'' with respect to that element. Id. at 324 (quoting Fed. R. Civ. P. 56(e)

B. Discussion

Defendant argued that plaintiff's claim is barred by the statute of limitations. Defendant has the burden to prove facts necessary to establish the application of the statute of limitations. Louisville and Nashville Railroad v. Saltzer, 151 Va. 165, 168 (1928). The applicable status of limitations period for personal injury claims is two years. The Code of Virginia provides:

> Unless otherwise provided in this section of by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

Code of Virginia § 8.01-243A. Furthermore, in cases of personal injury, ``the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained.'' Code of Virginia §8.01-230.

The crucial question in the present case is when was the injury sustained or when was plaintiff hurt. The Fourth Circuit has held that the statutory word ``injury'' in section 8.01-230 means ``positive, physical or mental hurt to the claimant.'' Locke v. Johns-Manville Corp., 221 Va. 951, 957 (1981). Furthermore, determining when the injury was sustained must ``be established from available competent evidence, produced by a plaintiff or a defendant, that pinpoints the precise date of injury with a reasonable degree of medical certainty.'' Id. at 959.

Defendant argues that the evidence suggest that plaintiff sustained his injury in July or August 1991 causing the statute of limitations to begin to run at that time.

In contrast, plaintiff argues that defendant has not shown any objective medical evidence suggesting an injury in July or August 1991. Plaintiff argued that the present case is distinctive because of the nature of the injury. At oral argument,

plaintiff characterized the neck injury as a ``mechanical injury'' with symptoms of transitory pain and soreness which eventually develop into an injury. Moreover, plaintiff argued that his physician, Dr. Lawrence Westmeyer, testified that due to the nature of the injury he would be unable to have objective proof of the point at which there was a diagnosable injury. (Dr. Westmeyer's Dep. pp. 47-48.) Plaintiff therefore argued that the statute of limitations should begin to run once there has been diagnosis of the neck injury.

The Court notes that the courts in Virginia have not upheld a discovery rule which triggers the statute of limitations when the injury is discovered or should have been discovered. Rather, the courts have held that this area is the domain of the General Assembly. Locke, 221 Va. at 959 (citing Virginia Military Institute v. King, 217 Va. 751, 760, 232 S.E.2d 895, 900 (1977)). Specifically, the court in Locke stated that its holding does not mean the limitation period begins to run until the initial diagnosis is made or communicated to the victim. Id. Therefore, the Court rejects plaintiff's argument that the statute of limitations began to run when there was a diagnosis of the neck injury.

Plaintiff also argued that the cause of action accrued and the statute of limitations began to run on June 16, 1993, when plaintiff stopped working at defendant's Norfolk plant. Plaintiff urged that the present case is one of continuing tortious conduct by defendant and that the statute of limitations period begins to run on the date the tortious conduct ceases. Plaintiff argued that this theory of continuing tort liability, enunciated in Farley v. Goode, 219 Va. 969, 252 S.E.2d 594 (1979), should apply to the present case based on the employer-employee relationship of the parties.

In Virginia, this theory of continuing negligence or continuing tort liability is limited to professional relationships requiring a continuation of services. Farley, 219 Va. at 980; Large v. Bucyrus-Erie Co., 707 F.2d 94, 98 (4th Cir. 1983). Farley involved a physician-client relationship and the underlying claim was denial malpractice. The Court is not persuaded that his theory of continuing tort liability should be extended to the facts of the present case.

Recently, the Fourth Circuit in Williams v. E.I. DuPont de Nemours and Company, 11 F.3d 464 (4th Cir. 1993), appeared to expand this theory of continuing tort liability. The dissent

in Williams characterized the majority's reasoning as ``a brazen circumvention of the Commonwealth of Virginia's limitation of continuing tort liability to contexts where defendants have undertaken professional obligations to provide continuing services, in direct conflict with this circuit's precedent.'' Williams, 11 F.3d at 467 (Luttig, J., dissenting). The Fourth Circuit in Williams has suggested that each exposure to a harmful substance can constitute a tortious act if a separate injury occurs based on that single exposure. In Williams, the court held that on June 13, 1989, plaintiff suffered an injury distinct from other alleged injuries since the exposure to paint fumes on that day caused plaintiff to go to the hospital. This Court need not discuss the validity of the majority's reasoning since Williams is factually distinguishable from the present case. Unlike the court's finding in Williams, this Court cannot make a finding that Mr. Brown suffered a separate injury on a particular work day on or after December 8, 1991. Rather, the Court finds that Mr. Browns' has a continuing neck injury which began with symptoms in July or August 1991.

The court in Williams recognized that it is well-established in Virginia

that the limitations period begins when the injury is sustained although additional damage may occur at a later date. Williams, 11 F.3d 464, 466 (1993). The court in Williams, quoting Scarpa v. Melzig, 237 Va. 509, 379 S.E. 2d 307, 309 (1989), stated:

> Moreover, when any injury, though slight, is sustained as the consequence of an alleged wrong, the right of action for a personal injury accrues and the statute of limitations begins to run at once. It is immaterial that all the damages resulting from the wrong may not have been sustained at the time of the negligent act; the running of the statute of limitations is not postponed by the fact that substantial damages do not occur until a later date.

On this principle that the cause of action accrues upon a contemporaneous personal injury caused by a tort, the court in Williams further stated that ``when a tort causes a contemporaneous personal injury the fact that the victim suffered greater physical or mental hurt from that tort at a later date does not defer the date of accrual of the cause of action.'' Williams, 11 F.3d at 466 (quoting Starnes v.

Cayouette, 244 Va. 202, 419 S.E. 2d 669, 671 (1992)). Similarly, the Fourth Circuit has held previously that repeated exposure to asbestos did not result in numerous, distinct injuries for the purpose of the statute of limitation. Joyce v. A.C. and S., Inc., 785 F.2d 1200 (4th Cir. 1986). The court in Joyce held that there was a ``single, indivisible cause of action for all injuries sustained, whether or not all of the damage is immediately apparent.'' Joyce, 785 F.2d at 1205. The Court finds that plaintiff has alleged a single cause of action for the negligence of defendant in not taking corrective action in plaintiff's workplace thereby causing a permanent injury to plaintiff's neck. Furthermore, although the facts suggest that Mr. Brown's injury was eventually diagnosed and that the injury became more severe over time, the law in Virginia does not prevent the cause of action from accruing the day the injury was initially sustained.

In determining whether the limitation period has run, the Court notes that it need not pinpoint the precise date of injury. The Court need only determine whether the injury was sustained two years prior to December 8, 1993, the date plaintiff filed his claim, and thereby outside of the two-year statute of limitations period.

See Large v. Bucyrus-Erie Co., 707 F.2d 94, 97 (4th Cir. 1983).

As noted, the courts in Virginia have held that a court's finding of when the injury was sustained must be supported by medical evidence. This Court has considered the depositions of the plaintiff and his physician, Dr. Frank Westmeyer. See Williams, 11 F.3d at 466 (relying solely on the deposition of plaintiff because there was no medical evidence).

The Court finds that the record contains sufficient medical evidence to show that plaintiff was experiencing pain in his neck as early as August 1991. Plaintiff testified that he complained of neck pain to Gary Ricks, a former superintendent of the plant, in either July or August 1991. (Brown's Dep. pp. 31, 72.) Plaintiff further testified that he suffered stiffness and strain in his neck in July and August 1991 and it progressively worsened until he saw a doctor in 1992. (Brown's Dep. at pp. 73-74.) Dr. Westmeyer testified that plaintiff complained of neck pains in either March 1990 or March 1991 (Dr. Westmeyer's Dep. at pp.9-10, 40-41.) Dr. Westmeyer further stated that the nature of plaintiff's work was at least one cause of plaintiff's neck pain, although he could not indicate the

precise date of such causation. (Dr. Westmeyer's Dep. at pp. 23-24, 28).

Counsel for defendant indicated at oral argument that he could not indicate the precise date of injury. Nonetheless, the facts are not in dispute that plaintiff sustained a neck injury prior to December 8, 1991. The injury manifested itself in July or August 1991 through symptoms of pain and discomfort. See Locke, 221 Va. at 959 (finding that impairment of function indicated symptom manifesting the injury). The two-year statute of limitations period began to run at the date Mr. Brown sustained his injury thereby barring his claim filed on December 8, 1993.

III. CONCLUSION

The Court concludes that plaintiff's claim is barred by the relevant statute of limitations period. Therefore, the Court GRANTS defendant's Motion for Summary Judgment and orders the Clerk to Enter judgment in favor of the defendant.

The clerk shall mail a copy of this Opinion and Order to all counsel of record.

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UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia
July 12, 1994

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

GENEVA ENGLAND,

Plaintiff,

v.

CIVIL ACTION NO. 2:94cv149

PLYWOOD PANELS, INC.,

Defendant.

OPINION AND ORDER

This matter comes before the Court ton defendant's Motion for Summary Judgment filed on June 14, 1994. Plaintiff Geneva England filed a response and brief in opposition on June 27, 1994. The parties have consented to have all proceedings in this case conducted before a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. The undersigned heard oral arguments on this matter on Tuesday, July 5, 1994.[5]

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[5] Counsel also argued defendant's Motion for Summary Judgment in a related case, Michael V. Brown v. Plywood Panels, Inc.

I. STATEMENT OF THE CASE

Plaintiff Geneva England worked at Plywood Panels, Inc.'s Norfolk plant as a panel inspector. She worked ten hour shifts four or five days per week. (Pl.'s Complaint Paragraph 4.) Plaintiff described that the production line had a large roller which changed the angles of the panels so the panels face upright allowing the inspector to view the panels in a relaxed sitting position. (England Dep. p. 7, lines 19-23.) When plaintiff returned to work on July 5, 1991, the roller in the production line had been removed and the lights near the panel inspection station had been changed. (England Dep. p. 20, lines 1-8.) As a result of this change, the inspectors including plaintiff ``were required throughout their work shift to shift and strain their necks, shoulders and upper backs in order to properly inspect the panels.'' (Pl.'s Complaint paragraph 7.) Plaintiff left the employment of defendant when the plant closed on June 16, 1994.

On February 4, 1994, plaintiff filed a Complaint in the United States District Court of the Eastern District of Virginia, Norfolk Division. Plaintiff claimed hat defendant was negligent in altering the panel production line and not taking

corrective action upon hearing the panel inspector's complaints of physical pain and discomfort. Plaintiff further alleged that defendant's negligence was the direct cause of plaintiff's ``permanent, painful injury to her neck and upper torso.'' (Pl.'s Complaint paragraph 9.)

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment should be granted only if ``there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.'' Fed. R. Civ. P. 56(c). For the evidence to present a ``genuine'' issue of material fact, it must be ``such that a reasonable jury could return a verdict for the non-moving party.'' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Facts are deemed material if they might affect the outcome of the case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In other words, the moving party's submission must foreclose the possibility of the existence of facts from which it would

be open to a jury to make inferences favorable to the non-movant. Id.

In deciding a summary judgment motion, the court must view the records as a whole and in the light most favorable to the non-moving party. - Terry's Floor Fashions, Inc. v. Burlington Indus., Inc., 763 F.2d 604, 610 (4th Cir. 1985). Either party may submit as evidence ``pleadings, depositions, answers to interrogatories, and admissions on file, together with... affidavits'' to support or rebut a summary judgment motion. Fed. R. Civ. P. 56(c). Supporting and opposing affidavits must be based on personal knowledge and must set forth facts that would be admissible in evidence. Fed. R. Civ. P. 56(e). Furthermore, the party moving for summary judgment need not supply ``affidavits or others similar materials negating the opponent's claim.'' Celotex, 477 U.S. at 323. When a motion for summary judgment is made and supported with affidavits as it is in this case, however, ``an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial.'' Fed. R. Civ. P. 56(e).

Rule 56 mandates summary judgment against a party who ``fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.'' Celotex, 477 U.S. at 322. The party who bears the burden of proving a particular element of a claim must ``designate `specific facts showing there is genuine issue for trial''' with respect to that element. Id. at 324 (quoting Fed. R. Civ. P. 56(e)).

B. Discussion

Defendant argued that plaintiff's claim is barred by the statute of limitations. Defendant has the burden to prove facts necessary to establish the application of the statute of limitations. Louisville and Nashville Railroad v. Saltzer, 151 Va. 165, 168 (1928). The applicable statute of limitations period for personal injury claims is two years. The Code of Virginia provides:

Unless otherwise provided in this section or by statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

Code of Virginia § 8.01-243A. Furthermore, in cases of personal injury, ``the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained.'' Code of Virginia § 8.01-230.

The crucial question in the present case is when was the injury sustained or when was plaintiff hurt. The Fourth Circuit has held that the statutory word ``injury'' in section 8.01-230 means ``positive, physical or mental hurt to the claimant.'' Locke v. Johns-Manville Corp., 221 Va. 951, 957 (1981). Furthermore, determining when the injury was sustained must ``be established from available competent evidence, produced by a plaintiff or a defendant, that pinpoints the precise date of injury with a reasonable degree of medical certainty.'' Id. at 959.

Defendant argues that the evidence suggests that plaintiff sustained her injury no later than October 1991 causing the statute of limitations to begin to run at that time.

In contrast, plaintiff argues that defendant has not shown any objective medical evidence suggesting an injury in October 1991. Rather, plaintiff argues that there is testimony by plaintiff's physician, Dr. Morales, that the precise date of plaintiff's

neck injury cannot be pinpointed since a doctor cannot determine when the disk actually became displaced. (Dr. Morales' Dep. at 27.) Plaintiff argued that the present case in distinctive because of the nature of the injury. At oral argument, plaintiff characterized the neck injury as a ``mechanical injury'' with symptoms of transitory pain and soreness which eventually develop into an injury. Plaintiff therefore argued that the statute of limitations should begin to run once there has been diagnosis of the neck injury.

The Court notes that the courts in Virginia have not upheld a discovery rule which triggers that statute of limitations when the injury is discovered or would have been discovered. Rather, the courts have held that this area is the domain of the General Assembly. Locke, 221 Va. at 959 (citing Virginia Military Institute v. King, 217 Va. 751,1 760, 232 S.E.2d 895, 900 (1977)). Specifically, the court in Locke stated that its holding does not mean the limitation period begins to run until the initial diagnosis is made or communicated to the victim. Id. Therefore, the Court plaintiff's argument that the statute of limitations began to run upon diagnosis of the neck injury.

Plaintiff also argued that the cause of action accrued and the stature of limitations began to run on June 16, 1993, when plaintiff stopped working at defendant's Norfolk plant. Plaintiff argued that the present case is one of continuing tortuous conduct by defendant and that the stature of limitations period begins to run form the date of the tortuous conduct ceases. Plaintiff argued that this theory of continuing tort liability, enunciated in Farley v. Goode, 219 Va. 969, 252 S.E.2d 594 (1979), should apply to the present case based on the employer-employee relationship of the parties.

In Virginia, this theory of continuing negligence or continuing tort liability is limited to professional relationships requiring a continuation of services. Farley, 219 Va. at 980; Large v. Bucyrus-Erie Co., 707 F.2d 94, 98 (4th Cir. 1983). Farley involved a physician-client relationship and the underlying claim was dental malpractice. The Court is not persuaded that this theory of continuing tort liability should be extended to the facts of the present case.

Recently, the Fourth Circuit in Williams v. E.I. DuPont de Nemours and Company, 11 F.3d 464 (4th Cir. 1993), appeared to expand this theory of

continuing tort liability. The dissent in Williams characterized the majority's reasoning as ``a brazen circumvention of the Commonwealth of Virginia's limitation of continuing tort liability to contexts where defendants have undertaken professional obligations to provide continuing services, in direct conflict with this circuits precedent.'' Williams, 11 F.3d at 467 (Luttig, J. dissenting). The Fourth Circuit in Williams has suggested that each exposure to a harmful substance can constitute a tortuous act if a separate injury occurs based on that single exposure. In Williams, the court held that on June 13, 1989, plaintiff suffered an injury distinct from other alleged injuries since the exposure to paint fumes on that day caused plaintiff to go to the hospital. This Court need not discuss the validity of the majority's reasoning since Williams is factually distinguishable from the present case. Unlike the court's finding in Williams, this Court cannot make a finding that Ms. England suffered a separate injury on a particular work day on or after February 4, 1992. Rather, the Court finds that Ms. England has a continuing neck injury which began with symptoms in either July or October 1991.

The court in Williams recognized that it is well-established in Virginia that the limitations period begins when the injury is sustained although additional damage may occur at a later date. Williams, 11 D.k3d 464, 466 (1993). The Court in Williams, quoting Scarpa v. Melzig,237 Va. 509, 379 S.E. 2d 307, 309 (1989), stated:

> Moreover, when any injury, though slight, ins sustained as the consequence of an alleged wrong, the right of action for a personal injury accrues and the statute of limitations begins to run at once. It is immaterial that all the damages resulting from the wrong may not have been sustained at the time of the negligent act; the running of the statute of limitations is not postponed by the fact that substantial damages do not occur until a later date.

On this principle that the cause of action accrues upon a contemporaneous personal injury cased by a tort, the court in Williams further stated that ``when tort causes a contemporaneous personal injury the fact of that the victim suffered greater physical or mental hurt form that tort at a later date does not defer the date of accrual of the cause

of action.'' Williams, 11 F.3d at 466 (quoting Starnes v. Cayouette, 244 Va. 202, 419 S.E.2d 669, 671 (1992)). Similarly, the Fourth Circuit has held previously that repeated exposure to asbestos did not result in numerous, distinct injuries for the purpose of the statute of limitations. Joyce v. A.C. and S., Inc., 785 F.2d 1200 (4th Cir. 1986). The Court in Joyce held that there was a ``single, indivisible cause of action for all injuries sustained, whether or not all of the damage is immediately apparent.'' Joyce, 785 F.2d at 1205. The court finds that plaintiff has alleged a single cause of action for the negligence of defendant in not taking corrective action in plaintiff's workplace thereby causing a permanent injury to plaintiff's neck. Further more, although the facts suggest that Ms. England's injury was eventually diagnosed and that the injury became more severe over time, the law in Virginia does not prevent the cause of action from accruing the day the injury was initially sustained.

In determining whether the limitation period has run, the Court notes that it need not pinpoint the precise date of injury. The Court need only determine whether the injury was sustained two years prior to February 4, 1994, the date plaintiff filed her

claim, and thereby outside of the two-year statute of limitations period. See Large v. Bucyrus-Erie Co., 707 F.2d 94, 97 (4th Cir. 1983).

As noted, the courts in Virginia have held that a court's finding of when the injury was sustained must be supported by medical evidence. This Court has considered the depositions of the plaintiff and her physician, Dr. Lawrence R. Morales. See Williams, 11 F.3d at 466 (relying solely on the deposition of plaintiff because there was no medical evidence).

The Court finds that the record contains sufficient medical evidence to show that plaintiff was experiencing pain in her neck as early as August 1991. Plaintiff testified that she complained of neck pain to Gary Rick's, a former superintendent of the plant, in either July or August 1991 (England's Dep. at 25-26.)

Alternatively, the record shows that plaintiff experienced pain in her neck in October 1991. She testified that she had pain due to stiffness in her neck in October 1991 when she went to her family physician. (England's Dep. at 20-23, 30) Furthermore, Dr. Morales testified that plaintiff's medical history showed that she suffered from pain in October 1991 when she went to visit her family physician. (Dr. Morales' Dep. at 21.)

Although plaintiff did not visit Dr. Morales until December 6, 1993, his testimony is medical evidence that plaintiff had pain in her neck prior to February 4, 1992. Dr. Morales testified that the pain which plaintiff suffered was a symptom of the problem which occurred in her neck Dr. Morales further stated that the injury was related to the nature of plaintiff's work. (Dr. Morales's Dep. at 26.)

Counsel for the defendant indicated at oral argument that he could not indicated the precise date of injury. Nonetheless, the facts are not in dispute that plaintiff sustained a neck injury prior to February 4, 1992. The injury manifested itself in July or August 1991 or in October 1991 through symptoms of pain and discomfort. See Locke, 221 Va. at 959 (finding that impairment of function indicated symptom manifesting injury). The two-year statute of limitations period began to run at the date Ms. England sustained her injury thereby barring her claim filed on February 4, 1994.

II. CONCLUSION

The Court concludes that plaintiff's claim is barred by the relevant statute of limitations period. Therefore, the Court GRANTS defendant's Motion for Summary Judgment and orders

the Clerk to enter judgment in favor of the defendant.

The Clerk shall mail a copy of this Opinion to all counsel of record.

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UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia
July 12, 1994